UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
MILLENNIUM MULTIPLE EMPLOYER WELFARE BENEFIT PLAN	)	**CHAPTER 11**
	)	
	)	**CASE NO. 10-13528**
DEBTOR.	)	
	)	
CLAUDE YOUNG, et al.,	)	
	)	
Plaintiffs,	)	**ADVERSARY NO. 10-01176**
	)	
v.	)	
	)	
THE MILLENNIUM MULTIPLE EMPLOYER WELFARE BENEFIT PLAN, et al.,	)	
	)	
	)	
Defendants.	)	

AVIVA LIFE AND ANNUITY COMPANY'S RESPONSE TO PLAINTIFFS' UNOPPOSED MOTION FOR ORDER GRANTING DISMISSAL OF CERTAIN DEFENDANTS AND PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL OF CONSPIRACY CLAIM

Defendant Aviva Life and Annuity Company, f/k/a Indianapolis Life Insurance Company ("Aviva "), hereby submits this response in opposition to Plaintiffs' Unopposed Motion [Dkt. 32] for an Order Granting Dismissal of Certain Defendants and Plaintiffs' Motion for Voluntary Dismissal of Conspiracy Claims (the "Dismissal Motion").

DISCUSSION

"Rule 41(a)(2) requires a court to review a motion by a plaintiff to dismiss a complaint if the action has proceeded beyond service of an answer or of a motion for summary judgment, and there is not unanimous agreement among all parties supporting the dismissal." *County of Santa Fe, New Mexico v. Public Serv. Company of New Mexico*, 311 F.3d 1031, 1047 (10th Cir. 2002).

The purpose of this review requirement is "'primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.'" *Id*. (quoting *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th cir. 1993)). In cases such as this one, where the plaintiff seeks the dismissal of less that all the defendants, the Court should consider whether the remaining defendant or defendants in the case will be prejudiced by the dismissal. *Plains Growers, Inc. by and through Florists' Mut. Ins. Co. v. Ickes-Bram*, 474 F.2d 250, 254 (5th cir. 1973).

The Dismissal Motion seeks this Court's leave to dismiss the Debtor, the Millennium Multiple Employer Welfare Benefit Plan (the "Debtor"), as well as their conspiracy claim against all of the defendants. Aviva does not object to the dismissal of Plaintiffs' conspiracy claim. However, Aviva strongly objects to the dismissal of the Debtor to the extent such dismissal would adversely affect Aviva's right to have the Debtor's alleged fault effectively apportioned in this case, and/or to the extent it would prejudice Aviva's right to effectively adjudicate its claims for indemnity and contribution against the Debtor in this Court.

Despite Plaintiffs' repeated attempts to minimize the role of the Debtor in this case after it filed for Chapter 11 bankruptcy protection in this Court, the Debtor is, and will remain, one of the key parties, if not the key party, in this case. The overriding issue raised by this lawsuit, as well as a host of like lawsuits (brought by the same attorneys) *and* two related interpleader actions now pending in this Court, is whether the Debtor's principal assets—insurance policies on the lives of the plan participants, including the Plaintiffs—were obtained by fraud. Moreover, because the validity of *the Debtor* and *its* tax benefits are the central issue in this case, an assessment of *the Debtor's* comparative fault will be essential to the several liability determinations that will need to be made, not only of the Debtor itself, but also of all other

defendants, including Aviva.[1] *See Smith v. Jenkins*, 873 P.2d 1044, 1047 n. 15 (Okla. 1994) ("our present comparative-negligence regime (23 O.S. 1981 §§ 13, 14 …) under which a plaintiff who was not more than 50% negligent may recover one half of the damage sustained."); Tex. Civ. Prac. & Rem. Code §33.002; *In re Sunpoint Securities, Inc.*, 377 B.R. 513, 568 (Bankr. E.D. Tex. 2007) ("In virtually any cause of action based upon tort asserted under Texas law, Chapter 33 of the Texas Civil Practice and Remedies Code … requires the trier of fact to engage in a comparative fault analysis and to determine the "percentage of responsibility" among various persons who could be held liable for the damages which have been sustained by a plaintiff in a tort action"); *Poper ex rel. Poper v. Rollins*, 90 S.W.3d 682, 686 (Tenn. 2002) (The Tennessee courts have also abandoned joint and several liability amongst joint-tortfeasors and "created a system in which each defendant is liable for only the percentage of damages caused by the defendant's negligence"). Equally significant, Aviva has filed a cross claim for contribution and indemnity against the Debtor (and Republic Bank & Trust as the Plan Trustee) in this case, alleging, *inter alia*, that the Debtor "was responsible for the design, marketing and administration of the Millennium Plan." *See* Aviva's Cross Claim, filed May 28, 2010, at p. 8 ¶28.

Plaintiffs ignore these facts in the apparent belief that a dismissal of the Debtor will somehow lead to a remand of their remaining claims against Aviva and the other non-debtor defendants in this adversary proceeding. This conclusion, however, is simply not correct. To the contrary, because the Plaintiffs and Aviva have now filed proofs of claims in the Debtor's bankruptcy case that are virtually identical to the claims they have asserted here, a dismissal of the Debtor at this point would do nothing more than create duplicative and piecemeal litigation

[1] The plan participants named as plaintiffs in this action are residents of, *inter alia*, Oklahoma, Texas and Tennessee.

within this Court.[2] Indeed, the proofs of claim filed by the Plaintiffs in the Debtor's bankruptcy case ***seek exactly the same*** damages, based on ***exactly the same factual allegations***, as those asserted in this adversary proceeding. *See e.g.*, Proof of Claim filed by Thomas Calabrese (Claim No. 758) ("Claimant hereby files this Proof of Claim, in a presently unliquidated amount, for any and all taxes, fees, fines, interest and penalties assessed or that may be assessed by the [IRS] or other taxing authorities, as well as all professional fees incurred by Claimant in connection therewith, and lost investment returns that have arisen or may arise from contributions made by Claimant or on behalf of Claimant to the Millennium Plan based on the fraud and misrepresentations perpetuated on Claimants."). Therefore, Plaintiffs' attempt to essentially sever their claims against the Debtor by voluntarily dismissing it here would not change the fact that the claims Plaintiffs have now asserted in the Debtor' bankruptcy case, and the clearly related claims asserted in these proceedings, are inextricably intertwined. Under these circumstances, these interrelated claims should not be severed—either for purposes of the claims filed in this adversary proceeding or for purposes of their allowance or disallowance as claims in the Debtor's bankruptcy case. *See e.g.*, *Gallo v. Alitalia Linee Aeree Italiane, s.p.a.*, 2009 WL 910693 at *1 (S.D.N.Y., April 6, 2009) (denying motion to sever and applying automatic stay as to all defendants where plaintiffs' claims against both bankrupt and non-bankrupt defendants were "inextricably intertwined").

[2] *See* Proofs of Claim filed by: Thomas Calabrese (Claim Nos. 536 & 758); Calabrese Trucking, Inc. (Claim Nos. 619 & 757); Randolph Evans (Claim Nos. 539, 624 & 763); Joan Evans (Claim Nos. 538, 623 & 762); Randolph R. Evans, MD, PC (Claim Nos. 622 & 761); David French (Claim Nos. 541, 628 & 767); Tonia French (Claim Nos. 586, 629 & 768); David M. French, MD., PSC (Claim Nos. 626 & 766); Steven Harris (Claim Nos. 550, 647 & 786); Letitia Harris (Claim Nos. 549, 646 & 785); Dr. Steven L. Harris, D.M.D. (Claim Nos. 645 & 784); Michael McGinnis (Claim Nos. 583, 685 & 824); Southwest Pathology Associates, PC (Claim Nos. 684 & 823); Scott Robertson (Claim Nos. 582, 703 & 836); Scott Robertson MD, P.C., d/b/a Midwest Neurosurgery (Claim Nos. 702 & 835); Mark Wilson (Claim Nos. 575, 733 & 864); Mark E. Wilson, DDS, PC (Claim Nos. 733 & 864); Randy Wischnewsky (Claim Nos. 577, 737 & 868); M & C Fencing, Inc. (Claim No. 735 & 866); Aviva's Amended Proof of Claim (Claim No. 23).

As a practical matter, it is respectfully submitted that this Court will have to adjudicate the Plaintiffs' claims against the Debtor regardless of whether they are adjudicated here with all related claims or separately as part of the claims resolution process under the Debtor's confirmed Chapter 11 plan. And given the complexities of the claims against the Debtor, a separate adversary proceeding will in effect be needed if the Debtor is dismissed from this case and one or more of the Plaintiffs herein do not agree to settle their claims against the Debtor. *See* Debtor's Third Amended Chapter 11 Plan of Liquidation, as Modified (with Technical Corrections), at p. 25 § 8.6.2 ("Application of Adversary Proceeding Rules"), attached as Exhibit A to the Order Confirming Modified Plan issued on June 13, 2011 (Dkt. 1566). Accordingly, the interests of judicial efficiency and economy will not be furthered by a decision to dismiss the Debtor from this adversary proceeding. More importantly, such duplicative and piecemeal litigation would unquestionably cause undue prejudice to Aviva, as well as the Court and all other parties. Therefore, the Court should deny the Plaintiffs' unilateral motion to dismiss the Debtor from this adversary proceeding so that the various interrelated claims arising from and/or relating to its liquidation can be adjudicated together in this adversary proceeding.

CONCLUSION

For the foregoing reasons, Aviva respectfully submits that the Court should deny Plaintiffs' request for voluntary dismissal of the Debtor as set forth in Plaintiffs' purportedly Unopposed Motion [Dkt. 32] for an Order Granting Dismissal of Certain Defendants and Plaintiffs' Motion for Voluntary Dismissal of Conspiracy Claims.

Dated: July 5, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above-referenced document was served via the Court's Electronic Mailing System on the 5th day of July, 2011 as follows:

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